UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE,

Plaintiff,

Civil No. 2:07cv170

v.

KENYA WHITAKER AND
EASY SOFTWARE SOLUTIONS, LLC.,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE OR STAY THE PROCEEDINGS

Plaintiff, JTH Tax, Inc. d/b/a Liberty Tax Service ("Liberty"), files this Memorandum in Opposition to Defendant Kenya Whitaker's Motion to Transfer Venue or Stay the Proceedings.

I. FACTS

Whitaker and Easy Software Solutions, LLC. (collectively "Whitaker") are former Liberty franchisees who previously owned and operated one Liberty Tax Service franchise which gave to Whitaker the right to operate a Liberty Tax Service office using Liberty's proprietary trademarks and methods in a specified territory in Texas. On February 6, 2007, Whitaker was terminated as a result of failing to use the software and electronic filing services provided to her. (Hughes Decl. and Curry Decl.) Upon termination, Whitaker was required by her franchise agreements to comply with certain post termination obligations. These post termination obligations included a duty to remove all Liberty signage, transfer all telephone numbers to Liberty, cease identification of herself as a Liberty Tax franchisee, cease use of any of the Liberty trademarks, deliver to Liberty the copy of the Operations Manual and all updates loaned

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to her, deliver to Liberty all paper and electronic copies of her customer lists, tax return files and records and adhere to the provisions of the covenant not to compete. (Montalbano Decl., Ex. 4, ¶¶ 9-10.) Despite demands, Whitaker has not honored her post-termination duties and her actions are causing immediate irreparable harm to Liberty. (Hughes Decl.)

Further detailed facts and exhibits are contained in the Complaint and Declarations of Cory Hughes, Geoff Knapp, Chet Engstrom, Rebecca Ross, June Montalbano, Kathleen Curry, Sandra Stow, Rory Walters, Martha O'Gorman, Stephen Richard, Nathalie Sauvaire, Larry Johnson and Carl Khalil which are incorporated herein by reference.

II. SUMMARY OF ARGUMENT

1) Venue is appropriate in Virginia. The franchise agreement that Whitaker signed with Liberty expressly states:

> In any suit brought by [Liberty], which in any way relates to or arises out of this [Franchise] Agreement, or any of the dealings of the parties hereto, you consent to venue and personal jurisdiction in the state and federal court of the city or county of our National Office, presently Virginia Beach state courts and the United States District Court in Norfolk, Virginia. In any suit brought against [Liberty], . . . which in any way relates to or arises out of this [Franchise] Agreement, or any of the dealings of the parties hereto, venue shall be proper only in the federal court located nearest our National Office (presently the U.S. District in Norfolk, Virginia) . . . .
>
> (Montalbano Decl., ¶ 11.)

Moreover, Whitaker agreed in the franchise agreement, "Virginia law governs all claims which in any way relate to or arise out of this Agreement or the dealings of the parties hereto." *Id.* at ¶ 12.

2) Liberty's chosen venue is entitled to deference. Whitaker must establish that the deference due to Liberty is clearly outweighed by other factors. Whitaker has failed to meet this burden.

3) Convenience of the witnesses favors Virginia. Liberty has shown through particularized Declarations the names of the witnesses it intends to call at trial, the precise subject matter upon which they intend to testify, and the relevance of such testimony to the issues in dispute. On the other hand, Whitaker has failed to provide Affidavits or Declarations with names, anticipated testimony, and the relevance of such testimony to the issues in dispute.

4) Interests of justice favor Virginia. Virginia is the appropriate forum because the parties agreed to an exclusive forum selection clause in favor of venue in Virginia, Virginia law is to be applied, and Virginia's "rocket docket" ensures a quick and therefore lower cost resolution to this litigation.

5) This action should not be stayed. Whitaker has failed to meet the burden warranting transfer. Moreover, Virginia adheres to the "first-filed rule" thereby granting Liberty's Virginia lawsuit priority over Whitaker's suit which was filed nearly one month later and which has yet to be served upon Liberty.

III. VENUE IS APPROPRIATE IN VIRGINIA

Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to this cause of action arose in Virginia Beach. Whitaker argues for the transfer of venue under 28 U.S.C. § 1404. A plaintiff's choice of forum is entitled to substantial weight. *Corry v. CFM Majestic, Inc.,* 16 F. Supp.2d 660 (E.D. Va. 1998). "The decision whether to transfer an action pursuant to §1404(a) is committed to the sound discretion of the district court." *BHP Int'l Investment, Inc. v. Online Exch., Inc.,* 105 F. Supp.2d 493, 497 (E.D. Va. 2000). 28 U.S.C. § 1404(a) states, "For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Each of these three factors favors the denial of Whitaker's Motion to transfer this action.

A. The convenience of the parties favors resolution of this matter in Virginia

Liberty is headquartered and has its principal place of business in Virginia Beach, Virginia. (Second Hughes Decl.) Liberty has franchise agreements with franchisees in virtually every state in the United States. *Id.* However, the vast majority of Liberty's employees are located in Virginia Beach and that is where the principal support for Liberty's franchisees, including tax preparation and electronic filing assistance, come from. *Id.* It would be extremely inconvenient, costly and disruptive to Liberty's corporate operations to have to litigate cases all across the United States. *Id.*

Moreover, Liberty anticipates calling Virginia Beach Liberty employees to support its claims. (Khalil Decl.) For example, Liberty anticipates calling Cory Hughes to testify to the contractual agreements and obligations between the parties, the Liberty Tax business system and Operating Manual as well as Whitaker's failure to comply with the post termination obligations contained in the Franchise Agreement. (Hughes Decl.) Liberty further intends to call Sandra Stow, a Liberty Area Developer who has information as to Whitaker's operation of a Liberty office and Whitaker's in-term and post-term breaches of the Franchise Agreement. (Stow Decl.). Liberty also plans on calling Rebecca Ross to testify as to Whitaker's breach of the post termination duties of the Franchise Agreement and trademark infringement and Kathleen Curry to testify as to the actual termination of Whitaker which gave rise to the post termination provisions. (Ross Decl. and Curry Decl.). Liberty also anticipates calling Geoff Knapp who has information on Whitaker's breaches of the franchise agreement. (Knapp Decl.) Although Mr. Knapp does not reside in Virginia Beach, Virginia, Mr. Knapp lives in Maryland which is a short drive from Virginia. Other employees which Liberty anticipates calling to establish Liberty's claims and to rebut Whitaker's allegations include Nathalie Sauvaire, Liberty's Director of Tax Development to testify as to the tax preparation software and assistance provided to Whitaker, Larry Johnson, Liberty's Technological Support Supervisor to testify as to the technological support provided to Whitaker, Rory Walters, Liberty's Controller to testify as to monies withheld and payments applied to Whitaker's account, Martha O'Gorman, Liberty's Vice President of Marketing to testify as to marketing support provided to Whitaker, Stephen Richard, Liberty's Head Report Developer, to testify as to the number of tax returns and gross revenue of Whitaker's Liberty office and June Montalbano to testify as to the authenticity of Whitaker's Franchise Agreement. (Sauvaire Decl., Johnson Decl., Walters Decl., O'Gorman Decl., Richard Decl. and Montalbano Decl.)

Furthermore, many of the original documents relevant to this litigation are located at Liberty's headquarters in Virginia Beach and include the franchise agreements entered into between the parties, which form the basis of the claims between the parties. (Hughes Second Decl.)**;** *see also*, *McEvily v. Sunbeam-Oster Co., Inc.*, 878 F. Supp. 337, 348 (D.R.I. 1994)(presence of corporate documents at company headquarters in Florida is a factor that supports transfer of venue to Florida).

Finally, the fact that Whitaker signed a forum selection clause in favor of Virginia operates as a waiver of her right to object to the inconvenience of the Virginia forum. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.* 883 F.2d 1286, 1293 (7th Cir. 1989)("By virtue of the forum-selection clause, Midwhey has waived the right to assert its own inconvenience as a reason to transfer the case."); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 758 n.7 (3d Cir. 1973) ("[a] valid forum selection agreement may be treated as a waiver by the moving party of its right to assert its own convenience as a factor favoring a transfer from the agreed upon forum").

B. Whitaker failed to carry her burden in establishing that transfer is appropriate.

The burden of showing that a transfer is proper typically rests on the movant. *BHP Int'l Investment, Inc. v. Online Exch., Inc.*, 105 F. Supp.2d 493, 498 (E.D. Va. 2000). The moving party has the burden to establish by a clear and convincing showing that a transfer is appropriate and that the motion should be granted. *Matera v. Native Eyewear, Inc.*, 355 F. Supp.2d 680 (E.D. NY 2005). Whitaker is incorrect in her assertion that "all the other witnesses from whom Liberty has submitted affidavit support for the claims in the complaint are ***not*** residents of, or even located in, this district." (Whitaker Mot. to Transfer ¶ 37). Only one of the witnesses who submitted an initial declaration resides in Texas. As previously noted, Mr. Knapp resides in Maryland which is a short drive from this Court. All of the other witnesses currently reside in and work in Virginia.

Whitaker merely states in her Memorandum In Support Of the Motion to Transfer Venue that "those third party witnesses who substantiate the Whitaker's defenses, as well as their affirmative claims against Liberty, are located in Texas." (Whitaker Mot. to Transfer ¶ 40.) Whitaker goes on to list various individuals who have no bearing on the issues at hand. For instance, Whitaker names witnesses who can purportedly testify as to embarrassment suffered at a meeting and issues with Liberty's software. However, Liberty's Complaint is centered on Trademark Infringement and Breach of the Franchise Agreement. Not only has Whitaker failed to produce any affidavits which support these allegations and establish that these witnesses hold information relevant to trial, but the purpose for which Whitaker asserts these witnesses relevance has no relation to the causes of action brought by Liberty.

Moreover, Whitaker fails to submit any affidavits that remotely support her contentions as outlined in her Memorandum of Support of the Motion to Transfer Venue. "The moving party must support its motion with an affidavit containing detailed factual statements explaining why the motion should be granted including, among other things, the location of events giving rise to the suit, convenience of the parties and witnesses, transferee forum is more convenient." *Matera v. Native Eyewear, Inc.*, 355 F. Supp.2d at 686; *see also*, *Keck v. Employees Independence Assoc.*, 387 F. Supp. 241 (E.D. Pa. 1974)(Defendants who filed motion to transfer case failed to satisfy burden of proof when they failed to file affidavits, depositions, stipulations or other documents containing facts which established need to transfer).

Moreover, Whitaker expressly states in her own Affidavit and the Motion to Transfer Venue, that Liberty did not fully perform its franchise obligations in that Whitaker claims that Liberty's marketing support, technical support and software were lacking. These contentions further bolster Liberty's position that venue is appropriate in Virginia. All of Liberty's support comes from its headquarters located in Virginia. To rebut any of these operational allegations, Liberty would need to call employees who reside within Virginia. (Richard Decl., Johnson Decl. and Sauvaire Decl.)

Whitaker also falsely asserts that she "has no significant contacts with the Eastern District of Virginia…." (Mot. to Transfer, ¶ 31.) Whitaker, in fact, had extensive contact with Liberty's corporate headquarters, located in Virginia Beach, Virginia. This contact included Whitaker's attendance at a week long Effective Operations Training class in Virginia Beach, Virginia. (Hughes Decl.) As a franchisee, Whitaker also submitted regular reports to Liberty's corporate office in Virginia, corresponded with Liberty's employees in Virginia, received technological, tax and operational support from Liberty's employees in Virginia and made payments under the Franchise Agreement to Liberty's corporate office in Virginia. *Id.*

Whitaker contends that she lacks the financial resources to defend the action in Virginia and that Liberty has sufficient resources to defend across the country. (Whitaker Mot. to Transfer ¶ 48.) Whitaker will face the same issue of retaining counsel whether in Texas or Virginia. In fact, in *JTH Tax, Inc. v. Lee*, a very similar and recent case, this Court denied a former franchisee's Motion to Transfer venue in the face of a similar allegation about insufficient financial resources to litigate in Virginia. *JTH Tax, Inc. v. Lee,* Case No. 2:06cv486, p. 14 (Judge Smith April 2, 2007)(Judgment Opinion and Order attached hereto as Exhibit 1). This Court correctly noted that the former franchisee had made an insufficient showing of inability to litigate in Virginia. *Id.* at 14-15, 14 no. 8. Here, Whitaker is plainly using pleadings drafted by an attorney so she too can not show that she lacks the ability to litigate in Virginia.

Moreover, transferring the case to Texas will not save any of the legal expenses of retaining counsel. In addition, because of her agreement to the forum selection clause, Whitaker can not now be heard to complain of the cost of litigating in Virginia. *Cadapult Graphic Systems, Inc. v. Tektronix, Inc.*, 98 F. Supp.2d 560, 568 (D.N.J. 2000)("Cadapult cannot now be heard to decry the resultant litigation expenses and inconvenience associated with a transfer to Oregon. *By executing a forum-selection clause, the parties to the agreement bear the risks of such inconvenience.*")(emphasis added).

Whitaker's contention that Liberty has sufficient resources to defend across the country should not be considered. A party's financial position does not warrant transfer to another venue. *See, Klepper Krop, Inc. v Hanford,* 411 F. Supp. 276 (E.D. Neb. 1976)(Defendant's allegation that venue should be transferred because plaintiff was a large corporation and therefore far better equipped to absorb expenses and inconvenience of extended litigation outside its home district did not warrant granting of motion); *General Binding Corp. v. The Board Dudes*, 2004 U.S. Dist. LEXIS 21549 (N.D. Ill 2004)(difference in financial hardship was insufficient to warrant transfer).

Whitaker also contends that transfer is appropriate because the Texas action has before it "all those parties necessary to this dispute- Liberty, Whitaker, *and* ESS." (Mot. to Transfer, ¶ 2.) This point is moot, however, as Liberty has filed an Amended Complaint which names both Whitaker and ESS.

C. The interests of justice favor resolution of this matter in Virginia

Whitaker entered into a forum selection clause whereby Whitaker agreed to bring and defend any claims with Liberty solely in Virginia. (Montalbano Decl.) The presence of this forum selection clause weighs heavily in favor of litigation of this matter in Virginia in accordance with the agreement of and expectation of the parties. The United States Supreme Court has explained, "A motion to transfer venue under § 1404(a) calls on the district court to weigh in the balance a number of case-specific factors. **The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus."** *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)(emphasis added). Indeed, in his oft-cited concurrence in *Stewart,* Justice Kennedy stated that "a valid forum-selection [should be] **given controlling weight in all but the most exceptional cases."** *Id.* at 33 (Kennedy, J., concurring); *see also, Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1258 4th Cir. 1991)(venue of franchise dispute in Virginia was proper where the franchise agreement contained a forum selection clause in favor of Virginia:

"The one factor which weighs heavily in favor of Virginia is the forum selection clause included in the contract the parties entered into….").

In addition to the forum selection clause, another factor, the presence of the Virginia law choice of law clause, favors litigation in Virginia. *See, e.g., Page Constr. Co. v. Perini Constr.*, 712 F. Supp. 9, 12 (D.R.I. 1989)(case transferred to Massachusetts in part because of Massachusetts choice of law provision in contract at issue); *Reed v. Brae Railcar Mgmt., Inc.*, 727 F. Supp. 376, 380 (N.D. Ill. 1989)(choice of California law provision in contract was an "interests of justice" factor which supported transfer of venue to California in commercial law dispute.); *JTH Tax, Inc. v. Charon*, Case No. 2:05cv69 (Judge Smith October 26, 2006)(Judgment Opinion and Order attached hereto)(Court held contractual choice of law provisions are given full effect except under exceptional circumstances. "Exceptional circumstances recognized under Virginia law are circumstances in which there is no reasonable basis for the parties' choice of law or where consent to the provision was obtained by improper means, such as fraud or duress.")

Components of the "interests of justice" consideration in ruling on motions to transfer actions also include the economic and efficient utilization of judicial resources, the cost to parties, access to proof, and availability of compulsory process. *Minstar Inc. v. Laborde*, 626 F. Supp. 142 (E.D. Del. 1985). Other factors to consider include the applicable law, the court's familiarization with the court in trying a party's similar matters and the situs where the claim arose. *Resource Bank v. Progressive Ins.*, 2007 U.S. Dist. Lexis 2980, 11 (E.D. Pa. 2007).

The speed of the Eastern District of Virginia's "rocket docket" favors denial of the transfer as it ensures a quick and therefore lower cost resolution to the litigation. "Virginia presents a better forum because, there, the action can be tried more expeditiously and inexpensively…. The Eastern District of Virginia has implemented the 'rocket docket' under which a case will be tried within 180 days from the date of filing." *New England Machinery, Inc. v. Conagra Pet Products Co.*, 827 F. Supp. 732, 734 (M.D. Fla. 1993)(granting Defendant's Motion to Transfer Venue under 28 U.S.C. § 1404(a)).

In *Youngblood v. JTH Tax, Inc.*, a nearly identical suit where a former Liberty franchisee brought suit in Texas and Liberty brought suit in Virginia, the Texas court granted Liberty's Motion to Transfer the case to Virginia stating that it appeared that "trial would be more expedient in Virginia." *Youngblood v. JTH Tax Services, Inc.*, 2006 U.S. Dist. Lexis 49478, 15 (W.D. Tex. 2006).

Moreover, the Franchise Agreement which gives rise to the post termination obligations which Liberty is seeking to enforce was negotiated and executed in Virginia. (Montalbano Decl.) In the context of contract disputes, a relevant consideration in transferring venue is where the relevant agreements were negotiated and executed. *Resource Bank v. Progressive Ins.*, 2007 U.S. Dist. Lexis 2980. The place of negotiation and execution of the contract is the locus of operative facts for purposes of venue transfer. *Id.* at 11. Therefore, since the Franchise Agreements were executed in Virginia, Virginia's interest in resolving its local controversies weighs in favor of denying Lee's motion to transfer venue to an Illinois court. *See, Nowicki v. United Timber Co.*, 1999 U.S. Dist. LEXIS 12458 at 1 (E.D. Pa. 1999)(venue appropriate in district where contract was negotiated, formed and executed); *Strategic Learning v. Wentz*, 2005 U.S. Dist. LEXIS 1609 at 10 (E.D. Pa. 2005)("Where the cause of action is a breach of contract, some courts have held that the place where the contract was executed, payments were received, and telephonic conferences conducted will weigh in favor of looking to the particular district where execution of the contract occurred as an appropriate venue for the action.").

Whitaker fails to meet the burden of showing that fairness and practicality, in the interest of justice favors transfer of the case. Therefore venue is appropriate in Virginia. *See, Audi Ag v. D'Amato,* 341 F. Supp.2d 734 (E.D. Mich. 2004)(As defendant failed to meet its burden of showing that fairness and practicality strongly favored forum to which transfer was sought, court denied defendant's motion to dismiss; because plaintiff chose forum where it was strongly connected and convenience of parties analysis did not favor either party, defendant was attempting to merely shift inconvenience from one party to another.).

IV. DEFENDANT'S MOTION TO STAY THE PROCEEDINGS SHOULD BE DENIED

"A Motion to Stay Proceedings is not expressly provided for by the Federal Rules or by statute, although a district court has the inherent discretion to recognize such a motion under its general equity powers." *King Pharmaceuticals, Inc. v. Lupin LTD*, 403 F. Supp.2d 484, 489 (E.D. Va. 2005). A party who seeks a stay "must justify it by clear and convincing circumstances, and these circumstances must weigh more heavily than the potential harm to the party against whom the stay applies. Accordingly, the applicant for a stay 'must make out a clear case of hardship or inequity in being required to go forward….' Otherwise, a stay is not merited." *Id.* Whitaker has failed to meet this burden. Whitaker simply states in a brief paragraph that since Liberty's claims can all be tried in Texas and since all necessary parties are before the Texas court, a stay is appropriate. (Mot. to Transfer, ¶ 54.) Whitaker's argument fails for a number of reasons. One such reason is that Liberty has amended its Complaint and as such, all parties are now before this court.

An additional reason is that Virginia courts have long adhered to the "first-filed rule." This rule gives priority to the first suit filed absent a showing of a balance of convenience in favor of the second party to file. *Id.* Liberty's suit against Whitaker in Virginia was filed on April 12, 2007. Whitaker then brought suit against Liberty in Texas on May 9, 2007. In fact, Whitaker has yet to serve Liberty with this suit. As such, Liberty's suit against Whitaker in this court should not be stayed as it was the first suit to be filed.

The first-filed rule gives Liberty priority to the parallel suit that Whitaker filed in Texas which among other claims seeks a Declaratory Judgment against Liberty for the suit Liberty brought in this court. *See, Christian Broadcasting Network, Inc. v. Robertson*, 2006 U.S. Dist Lexis 1868 (E.D. Va. 2006)("The first-filed rule generally gives priority to the first lawsuit filed when there are parallel actions pending in different venues.") *See also, New Buckley Mining Corp. v. Int'l Union et al*, 946 F.2d 1072, 1073 (4th Cir. 1991)("Suits are parallel if substantially the same parties litigate substantially the same issues in different forums.").

V. CONCLUSION

For all the foregoing reasons, Whitaker's Motion to Transfer Venue or Stay Proceedings should be denied.

JTH Tax, Inc. d/b/a Liberty Tax Service

By: ________________/s/______________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECP system. I also hereby certify that on this date, I mailed the foregoing document by overnight mail, postage prepaid, to the following non-filing users:

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________________/s/______________

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